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No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1940

HERBERT H. MAASS, AS SOLE SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF IDA H. SAKS, DECEASED, PETITIONER

v.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 17) is reported in 29 F. Supp. 996. The opinion of the Circuit Court of Appeals (R. 31) is reported in 111 F. (2d) 78.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 24, 1940 (R. 39). The petition for a writ of certiorari was filed July 23, 1940. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

An estate exercised the option provided in Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, to have the value of the gross estate determined, for federal estate tax purposes, as of the date one year after the decedent's death. The question is whether rents, dividends, and interest earned upon the principal assets, after the date of death, may be included in valuing the estate, as provided in Article 11 of Treasury Regulations 80.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations involved are set forth in the Appendix, *infra*, pp. 7–14.

STATEMENT

This case was decided by the District Court (R. 17–25) on motion by the taxpayers (R. 15), and cross motion by the Collector (R. 16), for judgment on the pleadings. The material facts, as alleged in the complaint (R. 4–7), may be summarized as follows:

Ida H. Saks, the decedent, a resident of the City of New York, died on August 30, 1936 (R. 4). In the federal estate tax return filed on behalf of her estate, the executors exercised the option, provided by Section 302 of the Revenue Act of 1926, as

amended by Section 202 (a) of the Revenue Act of 1935, to have the value of all the property included in the estate on the date of the decedent's death determined as of the optional valuation date provided in the statute (R. 5).

Pursuant to Article 11 of Treasury Regulations 80, the Commissioner of Internal Revenue included in the amount of the decedent's gross estate the sum of $19,956.32, representing rents, dividends, and interest earned by and upon the property and assets of the estate subsequent to the date of death of the decedent (R. 5, 12). The federal estate tax which was thereafter assessed on this basis was duly paid, and claim for refund was filed and rejected; thereafter the present suit was instituted (R. 4–6).

The District Court decided that the amount in question was properly included in valuing the decedent's gross estate (R. 17–24); its judgment was affirmed by the court below (R. 31–38).

ARGUMENT

This case is the first presented to an appellate court involving the validity of Article 11 of Treasury Regulations 80 (1937 Ed.), *infra*, pp. 8–14. The District Court sustained the Regulations; the court below, Judge Chase dissenting, affirmed.

The Board of Tax Appeals in six cases [1] has fol-

[1] *Estate of Cordelia Y. Abendroth* v. *Commissioner* and *Estate of Kate Read Blacque* v. *Commissioner*, 41 B. T. A. 1178; *Estate of Benjamin M. Spurr, deceased, Wheeling*

lowed the decision of the court below. Only the District Court for the District of Maryland, in *Clark* v. *United States*, 33 F. Supp. 216, has taken a contrary view, holding the Regulations invalid.

Two of the Board cases (the *Spurr* and *Gude* cases) are now on review in the Circuit Court of Appeals for the Fourth Circuit and will probably be reached for argument in October. The Government's appeal from the District Court's decision in *Clark* v. *United States, supra,* will also probably be heard by that court at the same time. The Board's decision in the *Eaton* case, now on review in the Circuit Court of Appeals for the First Circuit, likewise will probably be reached for argument in October. The Board's decision in the

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Dollar Savings & Trust Co. and Arthur Clinton Stewart Spurr, Exrs. v. *Commissioner*, decided by the Board of Tax Appeals May 18, 1940, unreported memorandum opinion; *Estate of Gertrude Eaton, deceased, Robert H. Storer and Roger Amory, Exrs.* v. *Commissioner*, decided by the Board of Tax Appeals May 20, 1940, unreported memorandum opinion; *Estate of Harriet I. G. Singer, deceased, John Addison Singer, Jane Singer Patton and Peoples-Pittsburgh Trust Co. Exrs.* v. *Commissioner*, decided by the Board of Tax Appeals June 5, 1940, unreported memorandum opinion; *Granville Gude and Karl E. Jarrell, Exrs. of Estate of Catharine Loffler* v. *Commissioner*, decided by the Board of Tax Appeals June 15, 1940, unreported memorandum opinion; *Estate of Mildred Mack Mayer, deceased, Lucius W. Mayer, Chester M. Mayer, and Sol M. Stroock, Exrs.* v. *Commissioner*, decided by the Board of Tax Appeals July 13, 1940, unreported memorandum opinion. There are approximately 30 other cases pending in the Board involving this issue.

Abendroth case is on review in the Circuit Court of Appeals for the Second Circuit. The time for filing a petition for review in the *Singer* case will expire September 5, 1940, and if appealed the case will go to the Third Circuit. Final order has not yet been entered in the *Mayer* case, which would go to the Second or Third Circuit.

Six other cases are pending in various District Courts.[2]

We believe that the decision of the court below upholding the Regulations is correct. Moreover, even if the general question involved should be considered doubtful, there appears to be no pressing need for this Court to review it until there has been further litigation in the lower courts. There are aspects of the question which will not be presented by the record in the present case. For example, the District Court in *Clark* v. *United States, supra,* at p. 225, referred to differences between that case and the one at bar which it thought "important if not wholly controlling." It seems likely that several of the Circuits will pass upon the question within the next few months; accordingly, a denial of certiorari at this time will not preclude a later

[2] *Herbert Morse et al., Exrs. u/w William Jardine* v. *Hassett* (Mass.); *Margaret Brewster, Exr. u/w John Brewster* v. *Smith* (Conn.); *Lina Meierhof et al. Tr. u/w Edward Meierhof* v. *Higgins* (S. D. N. Y.); *Seabury Stanton, Exr. u/w Mary Stanton* v. *United States* (Mass.); *Joseph Dumesnil et al. Exr. Est. Harry Dumesnil* v. *Glenn* (W. D. Ky.); *Douglas Van Dyke et al. Exrs. Est. Louise Van Dyke* v. *United States* (E. D. Wis.).

review of this case at this Term if the course of subsequent litigation makes such review advisable.

CONCLUSION

The decision of the court below is, in our opinion, correct. Since the decision is the first by an appellate court upon the point involved, and the question will be presented within a few months to other Circuit Courts of Appeals upon differing records, the petition for a writ of certiorari should be denied at this time.

Respectfully submitted.

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AUGUST 1940.

APPENDIX

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 202. ESTATE TAX—VALUATION—

(a) Section 302 of the Revenue Act of 1926, as amended, is amended by adding a new subdivision as follows:

"(j) If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subdivision (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this title of any item shall be allowed if allowance for such item is in effect given by the valuation under

this subdivision. Wherever in any other subdivision or section of this title or in Title II of the Revenue Act of 1932, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subdivision, then for the purposes of the deduction under section 303 (a) (3) or section 303 (b) (3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or nonoccurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period)."

* * * * *

Treasury Regulations 80 (1937 Ed.):

ART. 11. *Optional valuation date.*—In general, the object of subdivision (j) of section 302 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

If the decedent died after August 30, 1935, the executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

(1) Any property distributed, sold, ex-

changed, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date one year after the date of the decedent's death;

(3) Any property, interest, or estate which is affected by mere lapse of time, valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date one year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever date first occurs.

Property "distributed" is limited to distributions thereof by the executor, or by the trustee in the case of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended. Distribution may be effected by the entry of the order or decree of distribution, or, if there is no such order or decree, by the segregation or separation of the property from the estate or the trust, or by the actual paying over or delivery of the property to the person entitled thereto by the will, or under the law, or by the terms of the trust.

The sale, exchange, or other disposition, to which subdivision (j) refers, may be one made by the executor, or by the trustee of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended, or by any other person to whom the property had not been distributed by the executor or by such a trustee, or to whom it had not passed from the gross estate as the result of a sale, exchange, or other dis-

position thereof, as, for example, a sale, exchange, or other disposition by an heir, devisee, donee, or grantee to whom the decedent in his lifetime transferred the property, or by the survivor of the decedent if the property had been held by them subject to the right of survivorship.

Property, in the case of a sale, exchange, or other disposition thereof within the 1-year period, is to be valued as of the date when it ceases to form a part of the gross estate, that is, the date when the title passes as the result of its sale, exchange, or other disposition. The terms "distributed," "sold," "exchanged," "or otherwise disposed of" comprehend all possible ways by which property may be separated or passed from the gross estate. Thus, money on hand at decedent's death which is thereafter used in the payment of the funeral expenses, or in settlement of claims against the estate, or is invested, falls within the term "otherwise disposed of."

The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j) treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death. Subdivisions of section 302, as amended, other than subdivision (j), supply the information necessary to that determination, subdivision (j) being, in the main, confined to the date or dates as at which the value is to be ascertained.

Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or had been previously so transferred by him, or at his death there was vested in him any such right or power in or with respect to the obligation as to bring it within any of the other subdivisions of section 302, as amended. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment.

As in the case of bonds and notes, the interest accrued and unpaid upon a judgment on the date as of which the judgment is to be

valued is to be included in the valuation. The valuation date of any part payment of the judgment, or of any interest thereon (without regard to whether earned before or after decedent's death), made between decedent's death and the date as of which the judgment is to be valued, will be the date of such payment.

When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether the earnings are made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling "ex dividend" on such valuation date, but is to be valued as of that date.

Differing from payments of principal and interest in the case of bonds and notes, those made upon a judgment are not pursuant to a promise but to an obligation imposed by law, which obligation, in its totality, is a part of the gross estate at decedent's death if coming within any of the other subdivisions of section 302, as amended. So, too, liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership.

By way of illustrating the operation of subdivision (j), there is given the following example in which the death of the decedent will be taken to have occurred December 1, 1935:

Description	Valuation date	Value at valuation date	Value at date of death
Improved real estate—not disposed of within year following decedent's death	Dec. 1, 1936	$30,000	$35,000
Rents accrued but unpaid under lease antedating decedent's death	Dec. 1, 1936	900	500
Rent paid Jan. 1, 1936	Jan. 1, 1936	600	------
Bonds sold June 1, 1936	June 1, 1936	59,400	60,000
Interest accrued and unpaid thereon	June 1, 1936	400	400
Interest paid Apr. 1, 1936	Apr. 1, 1936	1,200	------
Corporate stock—distributed to legatee Nov. 1, 1936	Nov. 1, 1936	100,000	200,000
Cash dividend paid upon such stock Aug. 1, 1936	Aug. 1, 1936	100,000	------
Bonds matured and paid Oct. 1, 1936	Oct. 1, 1936	12,000	12,000
Interest accrued	------	------	80
Interest paid at maturity	Oct. 1, 1936	240	------
Interest paid Apr. 1, 1936	Apr. 1, 1936	240	------
Corporate stock—not disposed of within year following decedent's death, and upon which no dividend was paid in that period	Dec. 1, 1936	50,000	100,000
Total value of gross estate pursuant to the election	------	354,980	------
Total value of gross estate as of date of decedent's death	------	------	407,980

* * * * *

The election is available to the executor only at the time the return is filed, and only if the return is filed within 15 months from the decedent's death, or within the period of an extension of time for filing granted under the provisions of article 68 or 69 of these regulations. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property. The election, if exercised, cannot be rescinded.

In every case where the election is exercised, the return, Form 706, must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death, together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of any of the property during the 1-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined in accordance with the provisions of subdivision (j). The amount of any income accrued and unpaid at the date of the decedent's death on each item of principal, the amount of any income collected or otherwise realized thereon after the decedent's death and prior to the date as of which the item of principal is to be valued, and the amount of any income accrued and unpaid thereon at such subsequent valuation date, shall be separately shown. All the information indicated by Form 706 must be supplied. Statements as to distributions, sales, exchanges, and other dispositions of the property within the 1-year period must be supported by evidence. If the court makes an order or decree of distribution during that period, a certified copy thereof must be submitted as part of the evidence. The Commissioner may require the submission of such additional evidence as is deemed necessary.

U. S. GOVERNMENT PRINTING OFFICE: 1949